

### III. Remarks

Re-consideration of the restriction requirement and examination of this application, in view of the above amendments and the following remarks, is herein respectfully requested.

After entering this amendment, claims 1-32 remain pending. Claims 2, 4, and 7 are amended. New Claims 33-37 have been added

#### ***Restriction Requirement***

In the Office Action, restriction was indicated as being required under 35 U.S.C. § 121 to one of the following inventions:

- I. Claims 1-17, drawn to a shaped body, classified in class 501, subclass 125; and
- II. Claims 18-32, drawn to a process of manufacture, classified in class 264, subclass 603.

The examiner has indicated that the inventions of I and II are related as process of making and product made under MPEP 806.05(f) where the product may be made by reaction sintering CaO and Al<sub>2</sub>O<sub>3</sub> rather than adding a CA<sub>6</sub> component. Applicant asserts that the requirement for restriction is improper and herein traverses the requirement. Although the restriction is traversed, in order for the applicant's response to be complete, it must include an election of an invention to be examined. MPEP § 818.03(b) In order to satisfy this requirement, the applicant hereby elects invention I with claims 1-17, drawn to a shaped body.

A product defined by the process by which it can be made is still a product claim. *In re Bridgeford*, 357 F.2d 679, 149 USPQ 55 (CCPA 1966) Such a product claim can only be restricted from the process if the examiner can demonstrate that the product as claimed can be made by another materially different process. MPEP § 860.05(f). In this case, the restriction is improper because reaction sintering calcium oxide and aluminum oxide to form a shaped body will not lead to a shaped body that exhibits the same properties as one sintered with a  $CA_6$  component. It is well known to one skilled in the art, that the reaction or sintering pathway is important in regards to the microstructure and properties exhibited by the shaped body. These properties, such as fracture energy, elasticity, strength, and porosity among others are important to the acceptability of the shaped body for use in a given application. Defining the product in terms of a process by which it is made is nothing more than a permissible technique that applicant may use to define the invention. MPEP § 860.05(f)

#### ***Allowable Subject Matter***

The applicant acknowledges the Examiner's indication of the allowability of Claims 7 and 8, if rewritten into independent form, including all of the limitations of any base claim and intervening claims. Accordingly, Claim 8 has been rewritten into independent form, with new Claim 33 being added. Also, the dependency of Claim 7 has been amended accordingly with the addition of new Claim 37. Since a dependent claim inherently includes the limitations of its base claims and any intervening claims, the rewriting of Claim 8 into independent form is properly considered a non-narrowing amendment.

In addition, Claims 34-36 have been added to depend directly from new independent Claim 33. Support for adding new dependent Claims 34-37 is found in Claims 2-4 and 7. In view of the above, it is submitted that these claims are allowable and such action is requested.

***Claim Rejections – 35 U.S.C § 112***

Pending Claims 2 and 4 stand rejected under 35 U.S.C. § 112 as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Responsive to this rejection, the applicant has amended Claims 2 and 4 to remove any indefiniteness. In particular, Claim 2 has been amended by removing the terms "characterized in that". Claim 4 has been amended for use of proper Markush terminology. The applicant also has amended Claim 7 to use proper Markush terminology as suggested by the Examiner. Accordingly, it is believed that this rejection is now moot and should be withdrawn.

***Claim Rejections – 35 U.S.C. § 102 and 103***

Pending Claims 1-6, 9-17 stand rejected under 35 U.S.C. § 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over European Application Publication No. 1178023 to Volker, et. al. ("Volker"). Applicant respectfully traverses this rejection.

Responsive to this rejection, the cited reference, alone or in combination fails to teach each and every element of the claimed invention as recited in the claims of the present application as filed. The formulation described in Volker is for an unshaped cement castable body (col. 5, lines 3-7) Such a castable body is not fired as is done for the applicant's refractory shaped body [0015 & 0016]. One skilled in the art will

the art will recognize that high temperature firing of a mixture of refractory materials results in solubility between the species formed, and the formation of a microstructure that is significantly different than a castable mixture of refractory materials. Thus, the CA6 present in the unshaped castable body of Volker is not the same as the elasticizer present in the applicant's fired, shaped body.

Accordingly, the applicants believe that independent Claim 1 and the claims that depend directly or indirectly from Claim 1 are allowable for the reasons cited above. For all of these reasons, favorable reconsideration of independent Claim 1, as well as its dependent Claims 2-6, 9-17 is respectfully requested.

*Conclusion*

Since the amendments made to the claims are well supported by the original claims and specification, the amendments and new claims do not represent the addition of any new matter.

In view of the above amendments and remarks, it is respectfully submitted that the restriction requirement should be withdrawn and that the present form of the claims are patentably distinguishable over the art of record and this application is now in condition for allowance. Such action is requested.

Respectfully submitted,

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Date

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